No. 20,106

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Supplemental Petition to Review Supplemental Decision of the National Labor Relations Board

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

This is a proceeding under Section 10(f) of the National Labor Relations Act (29 U.S.C. Sec. 141 *et seq.*; herein called the Act) to review the Supplemental Decision of the National Labor Relations Board (herein called the Board) issued on December 16, 1964, in response to this Court's decree of December 17, 1962, entered in the prior proceeding herein identified on the Court's records as No. 17,698 (the decree in No. 17,698 is set forth in Appendix A

hereto). It is conceded that this Court has jurisdiction to review the Supplemental Decision herein under Section 10(f) of the Act, as it did the original decision and order in this matter. The alleged unfair labor practices occurred in, and the respondents before the Board transact business within, this judicial circuit.

I. STATEMENT OF THE CASE

Petitioner herein, the charging party before the Board, operates a television station at Sacramento, California, known as KXTV (O.R. 39, 86).[1] American Federation of Television & Radio Artists, San Francisco Local (often called AFTRA), and National Association of Broadcast Employees & Technicians, Local 55 (often called NABET; both being respondents in the proceedings before the Board and herein jointly called the Unions), who represented some of KXTV's employees, on about September 26, 1960, struck and began picketing KXTV's station (O.R. 85). In support of their strike, the Unions embarked on a concentrated campaign to induce secondary employers to cease advertising over petitioner's television station, KXTV, or, in other words, to cease doing business with KXTV. This campaign was summarized in this Court's opinion of November 9, 1962, in No. 17,698 (310 F.2d, at pp. 593-594),[2] as follows: the Unions——

> "(1) had committees of the unions call upon all of the advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the

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[1] By stipulation of the parties the printed Transcript of Record filed in No. 17,698 has been incorporated as part of the record in this proceeding; only the proceedings subsequent to the remand are contained in the Supplemental Transcript of Record filed herein. The abbreviations "O.R." identify references to the pages of the printed Transcript of Record in No. 17,698; the abbreviations "S.R." identify references to pages of the Supplemental Transcript of Record.

[2] This Court's opinion in No. 17,698 is set forth in Appendix B hereto noting the Federal Reporter System pagination.

station and assist the unions in their cause against KXTV;

"(2) had a committee call upon Capitol [3] for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;

"(3) mailed to all KXTV advertisers a letter setting forth the background of the strike and requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction;

"(4) printed and distributed four thousand handbills listing KXTV as 'unfair', and naming Geer, Rainbo, Shell and Burgermeister [4] as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer; [5]

"(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

"(6) sent a later letter to the San Francisco Labor Council listing fourteen companies who were then advertising on station KXTV, [6] with the observation that 'any aid' the Council and its affiliated members 'can give in this sponsor area' would be appreciated;

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[3] Capitol Studebaker Company, an automobile dealer in Sacramento (O.R. 85-87).

[4] John Geer Chevrolet Company, an automobile dealer in Sacramento; Rainbo Baking Company, a Sacramento bakery engaged in the baking and sale of bread and other baked products; Shell Oil Company, a national gasoline service station chain with stations in Sacramento; Burgermeister Brewing Corporation, a California beer manufacturer and distributor (O.R. 85-88).

[5] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo.

[6] In addition to Geer and Shell, those named were Blue Seal Bread; Hamm's Beer; Continental Baking Co.; Dr. Layne, Optometrist; Belkins Moving & Storage; and Crocker-Anglo Bank (O.R. 119-120).

"(7) showed to the President of Handy-Andy,[7] with an appeal to stop advertising on KXTV, a copy of a newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: 'We think you will agree that this continued association is contrary to the best interests of working people, and the public';

"(8) telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

"As a result of the described union activity one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station." [footnotes omitted]

The Court's summation is fully supported by the record (O.R. 85-93, 97-131).

Upon charges and amended charges (O.R. 3-18) filed by petitioner, alleging an unlawful consumer secondary boycott under Section 8(b)(4)(ii)(B) of the Act,[8] the General

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[7] Handy-Andy is a Sacramento television and appliance retail store (O.R. 88).

[8] Section 8(b)(4)(ii)(B) provides, in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * *

* * * * *

"*Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising

Counsel of the Board issued the Complaint herein against the Unions (O.R. 19-27) and secured a Section 10(1) injunction in the District Court for the Northern District of California (191 F.Supp. 676).[9] After hearing, a Trial Examiner of the Board sustained the Complaint (O.R. 38-57) and recommended an order restraining further such activity by the Unions (O.R. 57-59).

Upon exceptions by the Unions (O.R. 60-65), the majority of a three-member panel of the board, on December 27, 1961, reversed the Trial Examiner and dismissed the Complaint (O.R. 65-75), holding that the consumer secondary boycott was permissible under the second proviso to Section 8(b)(4) (see *supra*, p. 4, fn. 8), which exempts from that section—

> "*** publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer."

In rejecting petitioner's argument that it did not "produce" a "product or products" which were "distributed" by its advertisers, the panel majority held that KXTV, "by adding its labor in the form of capital, enterprise and service to the products which it advertises for secondary employers

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[8] [footnote cont'd]

> the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; * * *."

[9] Section 10(1) of the Act provides for injunctive relief in the district courts against secondary boycotts and certain other unfair labor practices upon "reasonable cause to believe" that a charge alleging such has merit, pending the Board's final decision in the matter.

becomes one of the producers of the product which it advertises'' (O.R. 73).

In No. 17,698, this Court, after thorough discussion in its unanimous decision of November 9, 1962 (310 F.2d, at pp. 595-600), concluded, contrary to the Board, that the ''publicity proviso . . . does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is utilized by other employers'' (at p. 600). Accordingly, the Court remanded the matter to the Board for determination as to whether the Unions' conduct constituted threats, coercion, or restraint prohibited by Section 8(b)(4)(ii)(B) (*ibid.*). It also returned for Board consideration the Unions' claim that their conduct was protected by the free speech and free press provisions of the Constitution *(ibid.)*.

Upon remand, petitioner moved the Board to reopen the record to receive evidence to augment the stipulated record and to receive evidence concerning the Unions' resumption of their intensive customer secondary boycott activities after the District Court injunction was dissolved on November 20, 1961 (S.R. 68-73). The motion was supported by affidavit and exhibits showing that these consumer secondary boycott activities were current at the time of the motions (S.R. 3-67). The Unions opposed reopening of the record (S.R. 74-76), and the motion was denied on February 8, 1963 (S.R. 81). In addition, petitioner filed a new consumer secondary boycott charge with the Board's Regional office. This charge is being held ''in abeyance'' by the Regional Office.[10]

On December 16, 1964, the Board, in response to this Court's remand of December 17, 1962, issued its Supplemental Decision (S.R. 82-88), which decision is here for review. In its Supplemental Decision, the Board found that the Unions' conduct set forth by the Court in items 2

[10] The charge is docketed in the San Francisco Regional Office as Case No. 20-CC-324.

through 8 (*supra*, pp. 2-4) constituted "restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act" (S.R. 85).[11] Nonetheless, the Board, relying on the intervening decisions of the Supreme Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, and *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, and citing this Court's recent decision in *N.L.R.B.* v. *Joint Council of Teamsters, No. 38*, 338 F.2d 23, 26 fn. 3, adhered to its prior conclusion that "KXTV, by the addition of its services (advertising) to the products involved here, is a 'producer' within the meaning of the proviso," and reaffirmed its dismissal of the Complaint (S.R. 87-88). On the free speech issue, the Board presumed the constitutionality of the statute without meeting the issue (S.R. 88, fn. 14).

II. SPECIFICATION OF ERRORS

1. The Board erred in holding that the Unions' coercive consumer secondary boycott activities were protected by the proviso to Section 8(b)(4) of the Act in disregard of this Court's prior decision to the contrary.

2. The Board erred in holding that the Unions' coercive consumer secondary boycott activities were protected by the proviso to Section 8(b)(4) of the Act, in disregard of the clear meaning and intent of the proviso.

3. The Board erred in holding that KXTV became a "producer" of the "products" advertised over its station by "the addition of its services (advertising)."

4. The Board erred in holding that KXTV became a "producer" of "products" by the advertisement of "services," not only products, over its station.

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[11] The Board found that item 1 involved "a mere request to neutral employers unaccompanied by any coercive acts" and, therefore, was not "prohibited activity within the meaning" of the section (S.R. 84-85). Petitioner disagrees with this conclusion because the conduct was part of a total course of unlawful action. Nevertheless, petitioner does not seek reversal of this conclusion here.

5. The Board erred in failing to distinguish between situations where "services" physically contribute to the production of a product for the market—as does transportation of the product, or distributing or wholesaling—and services—such as advertising—which make no contribution whatsoever to the production of a product but serve only to produce customers for a product or a service.

III. ARGUMENT

A. Summary of Argument

This Court, in No. 17,698, decided that the advertising services of KXTV did not make KXTV a producer of the "automobiles, bread, gasoline and beer" distributed by its advertisers (310 F.2d, at p. 596), or a producer of products by advertising "a service, such as banking or cleaning" (*ibid.*, at p. 597). Nothing in *N.L.R.B.* v. *Servette, Inc.* 377 U.S. 46, or *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, relied upon by the Board, or in *N.L.R.B.* v. *Joint Council of Teamsters, No. 38*, 338 F.2d 23 (C.A. 9), cited by the Board, in any respect disturbs the foregoing prior conclusions of this Court. The *Tree Fruits* decision treats with an entirely different aspect of the application of the publicity proviso to Section 8(b)(4) of the Act. The *Servette* and *Joint Council of Teamsters* cases hold merely that this Court's decision went too far in No. 17,698 insofar as it was later construed by this Court in *Servette* to hold that services of a wholesaler or distributor who physically handled tangible goods enroute to the market place, was not a producer of the tangible products offered for sale to the public. There is nothing in either decision that even suggests that a television station by advertising a product becomes a producer of such product within the meaning of the publicity proviso. The Board having found that the Unions' conduct constituted prohibited activities for a proscribed object under Section 8(b)(4)(ii)(B) of the Act, this Court should reverse the Board's dismissal of the Complaint and enforce

the Trial Examiner's recommended order, or remand the case to the Board for entry of an order not inconsistent with the Court's determination that the publicity proviso did not protect the Unions' consumer secondary boycott activities. There is no constitutional impediment to this Court's interpretation of the publicity proviso.

B. "Products" "Produced" and "Distributed" by KXTV

It may be appropriate here to review the so-called "products" "produced" by KXTV which the Board claims are being "distributed" by its advertisers. According to the Board, they consist of all the products advertised over KXTV and distributed by the advertisers because "by the addition of its services (advertising) to the products involved here, [KXTV] is a 'producer' within the meaning of the proviso" (S.R. 88). But KXTV contributes no services in the production of the products being distributed by its advertisers at any time from inception to the final distributional point to the customer. KXTV does not handle or otherwise work on the products being so distributed. The advertising services KXTV furnishes contribute not to the production of the advertised articles but to the production of customers for them after they are produced. It likewise produces customers for the services, such as banking and moving and storage services, advertised on its station, not the services themselves; nor are these services so advertised products themselves.

If advertising were deemed to make the advertising medium the producer of the products it advertised, this would apply to all advertising media, including newspapers and magazines. (The Board, in fact, has extended this view to newspapers. See *Ypsilanti Press, Inc.*, 135 NLRB 991, 997-998.) But this is absurd. The "products" "produced" by the publishers are the tangible objects—the newspapers and magazines themselves. Under the publicity proviso those "products" could be boycotted at the newsstands, tobacco shops, drugstores, etc., where "distributed."

There is no occasion for a strained application of the proviso to these advertising media which would permit unions having primary disputes with the media to go *backwards* and boycott the advertisers. The proviso on its face plainly is intended to permit products to be followed *forward only* from the point of the primary dispute to the point where the products are being distributed—*not backwards.* See *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits),* 337 U.S. 58, 64, fn. 7.

If the proviso were construed to permit unions having primary labor disputes with newspapers and magazines to back-up and boycott the latters' advertisers, it would also mean that in a *Servette* situation the union would be permitted to back-up to the manufacturers of the products being handled by the wholesaler and conduct a general consumer boycott of those products. But then the disputed products would become the ones manufactured by the manufacturer, *not the ones handled by the wholesaler.* The same is true in respect to advertising media. If unions are permitted to boycott newspaper and magazine advertisers, the disputed products would become the products of the advertisers, not the publishers' products—the newspapers and the magazines.

Like newspaper and magazine publishers, television and radio stations produce products of their own which are distributed to the public. The products are the television and radio programs, consisting of news-casts, music, plays, advertising, etc., which are distributed to the public over the wave-length assigned to the station. Distribution of this product to the public may be shut-off under the proviso by a consumer appeal not to listen to the station's wave-length. Were an establishment distributing a program generated by the station to its clientele, the proviso might protect a consumer boycott of such an establishment because of its distribution of the product of the station—but not because it may be an advertiser on the station. But in the instant

matter, KXTV's advertisers neither handle nor distribute KXTV's product—its programs.

Nothing in the foregoing is inconsistent with this Court's decision in No. 17,698. These views merely advance additional arguments showing that the conclusion of the Court in No. 17,698 was proper.

C. The Court's Decision in No. 17,698

The conclusion of the Court in No. 17,698 was that the "publicity proviso . . . does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers" (310 F.2d, at p. 600). As foundation for this conclusion, the Court noted (1) that "as all seem to recognize, the context in which the term 'product' appears in the proviso precludes the view that the television service rendered by KXTV, considered alone, is a 'product' within the meaning of the proviso" (*ibid.*, at p. 595); (2) that a "more persuasive reason why television advertising service, considered alone, could not be a 'product' lies in the fact that an advertising service rendered by a television station is not capable of being 'distributed' by an employer whose only relationship with the station is that of an advertiser" (*ibid.*, at p. 596); (3) that it is a "rather remarkable conclusion that a television station can be a producer of automobiles, bread, gasoline and beer" (*ibid.*); (4) that the "Board is still saying that a service, though one being advertised rather than the television service itself, is a 'product,' although not capable of being distributed" and "has involved itself in the additional difficulty of saying that a television station is a 'producer' of banking and cleaning services which are 'distributed' by banks and cleaners" (*ibid.*, at p. 597); and (5) that the "only primary employers referred to in the enacted proviso are those who produce a product or products . . . capable of distribution" (*ibid.*, p. 600).

However, by way of dictum the Court in No. 17,698 indicated that it did not believe that Congress in general intended the "publicity proviso to apply with regard to a primary employer who renders services instead of manufactures tangible articles" (*ibid.*, at pp. 596, 597). Subsequently, in *Servette, Inc.* v. *N.L.R.B.*, 310 F.2d 659, this Court, relying on the foregoing language in No. 17,698, held that a distributor who handles tangible products in the chain of their production from the manufacturer to the consuming public "does not produce" the "products" he handles within the meaning of the proviso (*ibid.*, at p. 667).

D. The Supreme Court's Decisions in Tree Fruits and Servette, and this Court's Reference thereto in Joint Council of Teamsters

The *Tree Fruits* case (*N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58) treats with the question of whether picketing of retailers who distributed tangible products of the primary employers, namely apples, with signs limited to the products of the primary employers violated the proviso. The conclusion was that the picketing, so limited, did not violate the proviso or the Act. Plainly, this limited holding has no bearing on this Court's decision in No. 17,698.

In *Servette* (*N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46), the Supreme Court reviewed and reversed this Court's decision in that case referred to above (p. 12). However, it is clear that the reversal was restricted to this Court's dictum in No. 17,698, applied in its *Servette* decision, to the effect that the publicity proviso was not intended "to apply with regard to a primary employer who renders services [like a distributor] instead of manufactures tangible articles" (*supra*, p. 12). The Supreme Court's cautious treatment of the *Servette* question, involving a distributor who handled and transported tangible goods in the chain of production from manufacturer to consuming public, plainly discloses no intent on the part of the Supreme Court to disturb

the decision of this Court in respect to the basic holding in No. 17,698, namely, that the advertising services furnished by KXTV to its advertisers does not make KXTV the producer of the products and services of its advertisers.

Although the Supreme Court twice in *Servette* (377 U.S., at pp. 55, 56) mentioned this Court's decision in No. 17,698, it at no time alluded to this Court's basic holding that the proviso does not protect consumer secondary boycott activities against advertisers over a television station with which latter the union has a primary dispute. Also, while the Supreme Court in sustaining the Board in *Servette* mentioned the Board's decision in *Lohman Sales Co.*, 132 NLRB 901 (377 U.S., at p. 55), which involved another distributor in the chain of production from manufacturer to consumer, it made no reference to the Board's decision in either this case or *Middle South Broadcasting Co.*, 133 NLRB 1698. It was in the latter case that the Board initially enunciated the theory that by furnishing advertising services a radio station becomes the producer of the products of the advertiser, and it was on the decision in that case that the initial decision of the Board in this matter was bottomed. Furthermore, the Supreme Court ignored the broad definitions of "product" and "production" relied upon by the Board in *Lohman* (132 NLRB, at pp. 906-907), and urged before this Court in No. 17,698 (see 310 F.2d, at pp. 596-597, fn. 11).

Instead, the Supreme Court (1) relied on the definitions of "produced" and "production" appearing in the Fair Labor Standards Act (29 U.S.C. Sec. 203 (j)), which limit the meaning of the term "produced" to "produced, manufactured, mined, handled, or in any other manner worked on," and the term "production" to "producing, manufacturing, mining, handling, transporting, or in any other manner working on" (377 U.S., at pp. 55-56);[12] (2) re-

[12] *United States* v. *Montgomery Ward & Co.*, 150 F.2d 369 (C.A. 7), cited by the Supreme Court in *Servette* (377 U.S., at p. 56, fn. 15), looked at these definitions for guidance for interpretation of the term "production" as used in the War Labor Disputes Act (150 F.2d, at pp. 376-377).

ferred to the fact that the Teamsters Unions were a "primary target" of the 1959 secondary boycott amendments (*ibid.*, at p. 55), and that they represent the "employees not of manufacturers, but of motor carriers" (*ibid.*); and (3) held that the proviso applied to "products distributed, as here, by a wholesaler with whom the primary dispute exists" (*ibid.*, at pp. 55, 56).

Thus, while holding that the term "producer" "must be given a broader reach" than in No. 17,698 in respect to wholesalers and others in the transportation industry (*ibid.*, p. 56), the Supreme Court carefully refrained from even intimating that this was so in respect to the advertising services of a television station. To the contrary, the Supreme Court's disregard of the all-encompassing definitions of "product" and "production" advanced by the Board, and reliance only on the restrictive definitions requiring physical contact with a tangible product, plainly indicates the Supreme Court's rejection of the Board's extreme position in this matter.

The dictum of the Supreme Court in *Servette* that "There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception" must be read in the light of the Supreme Court's conclusion that the Teamsters Unions were a "primary target" of the legislative purpose, rather than as a judicial endorsement of the proviso's extension to an irrational extreme. Had the Supreme Court intended to reverse the KXTV holding of this Court in No. 17,698, it would not have been so selective in the language it chose. It could easily have chosen language which would have embraced television stations, which advertise products of other employees, with employers who engage in "wholesale distribution of goods," as producers within the meaning of the proviso if this were what was intended (see 377 U.S., at p. 56). The failure of the Supreme Court to do so is eloquent. This Court's deci-

sion in No. 17,698, on the question directly involved, remains, therefore, unchallenged.

In *N.L.R.B.* v. *Joint Council of Teamsters, No. 38,* 338 F.2d 23, this Court properly stated that the Supreme Court's decision in *Servette* "requires that the term 'products' . . . be read to include services furnished by an employer performing a distribution function" (at p. 26). It did not, however, suggest that an advertising service makes the advertising medium a producer of the advertiser's products. The definitions relied upon by the Supreme Court in *Servette* foreclose such a conclusion. KXTV at no time assisted in the production of its advertisers' products by "handling, transporting, or in any other manner working on" them. Its services were designed to produce the customers, not the products.

Recently, the Seventh Circuit, in *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.,* 295 F.2d 375, 398, cert. denied 369 U.S. 812, aptly characterized a contract for advertising time on a television station as "a purchase by [the advertiser] of the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising *its products*" (emphasis added). In the same decision, the Seventh Circuit held that television advertising was not a sale of a "commodity" within the meaning of Sections 2(a) and (3) of the Clayton Act (15 U.S.C. Sec. 13(a), 14).

E. This Court's Decision in No. 17,698 Remains the Law-of-the-Case

The recent decisions of the Supreme Court, as shown, in no respect undermine this Court's legal conclusion in No. 17,698 that the "publicity proviso" "does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers" (*supra,* pp. 12-15). This Court in *Joint Council of Team-*

sters has properly recognized the limitation of the Supreme Court's *Servette* decision (*supra,* p. 15).

Under these circumstances, the Court's decision in No. 17,698 remains, untarnished, as the law-of-the-case and was improperly disregarded by the Board on the remand. The Eighth Circuit, in *Pet Milk Co.* v. *Boland,* 185 F.2d 298, 300-301, succinctly sets forth the law-of-the-case doctrine, as follows:

> . . . Stated generally, the rule is that, "where evidence is substantially the same on both trials, questions of law determined on . . . appeal are 'law of the case,' both for trial court and appellant court, on second . . . appeal."

This Court has applied this rule also following a limited remand, as here. *Todd* v. *Commissioner of Internal Revenue,* 165 F.2d 781 (C.A. 9); see also *Shevlin-Hixon Co.* v. *Smith,* 165 F.2d 170, 178 (C.A. 9); *cf. W. T. Smith Lumber Co.* v. *N.L.R.B.,* 246 F.2d 129 (C.A. 5).

No new evidence was taken on the remand; the factual record here is precisely what it was when this matter was before the Court in No. 17,698, except for the additional findings and conclusions of the Board that the Unions' conduct constituted coercion and restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act. The law-of-the-case doctrine plainly is applicable and forecloses departure from the legal conclusions in No. 17,698.

F. This Court's Interpretation of the Proviso in this Matter Does Not Impinge upon the Unions' Constitutional Rights Regarding Free Speech and Free Press

Although the Court remanded this question to the Board for consideration, it seems that the Court, itself, answered the question in No. 17,698 when it stated that "Section 8(c) of the Act . . . provided complete implementation of the First Amendment" and that this section "does not protect under the guise of free speech, publicity activity which is

associated with coercion'' (310 F.2d, at p. 599). Here the Board, itself, has found that the Unions' publicity was coercive. No more is required.

The Supreme Court has twice recently reviewed the prohibition against coercion and restraint contained in Section 8(b)(4)(ii)(B), as limited by the publicity proviso (*Tree Fruits* and *Servette, supra,* p. 12), and, except for one concurring judge (in *Tree Fruits,* 377 U.S. at pp. 76-80), has found nothing unconstitutional in the restrictions of the section.

As the Supreme Court stated in *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 502:

> ''it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.''

Previously, in *Thomas* v. *Collins,* 323 U.S. 516, 537-538 (and again in *Giboney,* 336 U.S., at p. 503, fn. 6), the Supreme Court, speaking of the constitutional guarantee of the right of peaceful persuasion, stressed:

> ''When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed, cf. National Labor Relations Board v. Virginia Electric & Power Co. [314 U.S. 469, 477-478]. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection that the espousal of any other lawful cause.''

Earlier, in *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U.S. 722, in respect to a factual situation strikingly similar to the one here, the Supreme Court upheld the right of a state to limit the exercise of freedom of speech in connection with a labor dispute. In that case, Ritter, the owner

of a cafe, had contracted for the construction of a building a mile and a half from the cafe. A dispute developed between the contractor and the union and the union commenced picketing the cafe with the resulting "curtailment of sixty per cent of Ritter's business." The Supreme Court, citing the absence of any dispute with Ritter over the operation of his restaurant, sustained a state court injunction enjoining the picketing of the cafe under the state anti-trust law "prohibiting the exercise of concerted pressure directed at the business, outside the economic context of the real dispute, of a person whose relation to the dispute arises from dealings with one of the disputants" (*ibid.*, at p. 726). The Supreme Court, holding that the injunction was not an unlawful abridgement of constitutional rights, quoted (*ibid.*, at p. 728) the following from its earlier decision in *Thornhill* v. *Alabama,* 310 U.S. 88, 103-104:

> "We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.'"

The factual situation here is substantially similar—"concerted activities directed at" automobile dealers, bakeries, gasoline distributors, breweries, a moving and storage company, a bank, etc., "outside of the economic context of the real dispute" with KXTV (a television station), "whose relation to the dispute arises from dealings" with KXTV concerning advertising.

Subsequently, the Supreme Court upheld the constitutionality of the 1947 secondary boycott amendments to the Act in *International Brotherhood of Electrical Workers* v. *N.L.R.B.,* 341 U.S. 694, stating (at p. 705) that:

> "The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no un-

> constitutional abridgement of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of § 8(b)(4)(A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise."

In doing so, the Court cited with approval (*ibid.*, at p. 705, fn. 9) the Tenth Circuit's decisions in *N.L.R.B.* v. *United Brotherhood of Carpenters,* 184 F.2d 60, 62, and *United Brotherhood of Carpenters* v. *Sperry,* 170, F.2d 863, 868-869, holding that the promulgation of a "blacklist," as well as picketing, in furtherance of a prohibited secondary boycott under the Act was not constitutionally protected. See also *Vincent* v. *Steamfitters Local Union 395,* 288 F.2d, 276, 278 (N.D.N.Y.), holding that a prohibited secondary boycott under the Act induced by leaflets or handbills was not constitutionally protected.

A prohibited consumer secondary boycott under the Act has no greater constitutional immunity.

IV. CONCLUSION

Wherefore, the Court should set aside the Board's Supplemental Decision, reverse the order of dismissal, and either enter a decree adopting the Recommended Order of the Trial Examiner or remand the matter to the Board for

entry of an order consistent with this Court's legal conclusions in No. 17,698.

Respectfully submitted,

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Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Winthrop A. Johns
Winthrop A. Johns
Attorney for Petitioner

August 31, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent
and
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55,
Intervenors.
} No. 17698

Decree

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Great Western Broadcasting Corporation d/b/a KXTV, filed December 29, 1961, to review an order of the National Labor Relations Board, issued by it on December 27, 1961, against the petitioner.

The Court heard argument of respective counsel on July 11, 1962 and has considered the briefs and transcript of record filed in this cause. On November 9, 1962 the Court being fully advised in the premises handed down its decision. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED that the order of the said National Labor Relations Board under review be and hereby is reversed and that this cause be and hereby is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions, raised by intervenors as noted in the opinion of this Court.

FRANK H. SCHMID
Clerk

Filed and Entered Dec. 17, 1962

APPENDIX B

319 F.2d 591

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent
and
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55,
Intervenors.

No. 17698
Nov. 9, 1962

On Petition for Review of an Order of the National Labor Relations Board

[593] Before: BARNES, HAMLEY and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

This is a proceeding to review an order of the National Labor Relations Board dismissing an unfair labor practice complaint. The case involves an attempt by two unions, assertedly using coercive methods, to force several companies to cease advertising on a television station with which the unions were having a labor dispute. It was charged that the union activity was proscribed by section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (Act), 29 U.S.C., § 158(b)(4)(ii)(B).

The charging party, and petitioner here, is Great Western Broadcasting Corporation, which operates television sta-

tion KXTV in Sacramento, California. The unions, which were respondents in the Board proceedings and are intervenors here, are American Federation of Television and Radio Artists, San Franciso Local, and National Association of Broadcast Employees and Technicians, Local 55.

The facts are not in dispute. A primary labor dispute between the unions and KXTV resulted in a strike which commenced on September 26, 1960. Picketing of the KXTV premises ensued. Among the advertisers who then regularly used the services and facilities of KXTV for advertising purposes were John Geer Chevrolet Company (Geer), Capitol Studebaker Company (Capitol), Rainbo Baking Company (Rainbo), Shell Oil Company (Shell), Burgermeister Brewing Corporation (Burgermeister), and Handy-Andy. Each of these advertisers is an employer engaged in commerce or in an industry affecting commerce within the meaning of the Act.

In an effort to win their labor dispute with KXTV, the unions took the following action:

(1) had committees of the unions call upon all of the advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;

(2) had a committee call upon Capitol for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;

(3) mailed to all KXTV advertisers a letter setting forth the [594] background of the strike and requesting discontinuance of advertising over the station,

warning that failure to do so would bring an adverse economic reaction;[1]

(4) printed and distributed four thousand handbills listing KXTV as "unfair," and naming Geer, Rainbo, Shell and Burgermeister as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer;[2]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

(6) sent a later letter to the San Francisco Labor Council listing fourteen companies who were then advertising on station KXTV, with the observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

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[1] This letter contained these statements:

". . . Any advertiser on this station while it is being operated by strike breakers will give the impression of taking sides in this dispute. . . .

". . . We are about to launch an intensive campaign to bring the facts behind this dispute to the attention of the entire population covered by this station. We are sure you recognize the obvious fact that many members of organized labor and their families, and those sympathetic to the cause of organized labor, will have long-lasting resentment against any product or sponsor who takes sides in this dispute by advertising on this station during the course of this worthy strike.

"If you are currently advertising for clients on this station, or have any advertising projected for the next six months, we are sure you will wish to change your plans to avoid the inevitable adverse reaction. . . ."

[2] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

"This statement is directed to the customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service."

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of a newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public"; [3]

(8) telephoned the general manger of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

As a result of the described union activity one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station. [4]

[595] There was no picketing, or threat to picket, the place of business of any of the advertisers. There was no

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[3] One thousand of these leaflets were printed, and a like number of ten similar leaflets were printed, each naming a different company which continued to advertise on KXTV. None of these leaflets, however, were distributed.

[4] As a result of the first letter sent by the unions to the San Francisco Labor Council, Shell received numerous letters enclosing Shell credit cards. The individual writers explained that they would pick up their cards in the future when Shell discontinued its advertising over KXTV.

On October 10, 1960 Capitol cancelled its $8,500 advertising contract with KXTV for the duration of the strike. In a letter of explanation, Capitol told KXTV that after its televised commercial one evening, the company's phones were "jammed" from 7:00 to 9:30 P.M. by callers claiming to be union people. These callers criticized Capitol for not supporting the strike and, in substance, said that for this reason they would not do business with the company.

On November 10, 1960, and as a result of the pressure described above, Rainbo cancelled a $26,000 advertising contract which it had entered into with KXTV a month previously.

physical violence or threat of physical violence. The handbills were truthful and their distribution was peaceful. None of the described union activity was designed to bring about a work stoppage by employees of any advertiser, and none had that effect.

On these facts the Board, with one member dissenting, held that the described union activity was protected by the publicity proviso at the end of section 8(b)(4) of the Act.[5] The complaint was therefore dismissed in its entirety.[6]

Petitioner here challenges the Board conclusion that the publicity proviso is applicable under the facts of this case. It contends that since that proviso pertains only to publicity concerning a "product" or "products" which are "produced" by a primary employer and which are thereafter

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[5] Section 8(b)(4) provides in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

"B. forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, . . .

* * * * *

"*Provided further*, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . ."

[6] A preliminary injunction against the unions which the Board had obtained, reported *sub nom. Brown* v. *American Federation of Television & Radio Artists, San Francisco Local*, N.D. Cal., 191 F.Supp. 676, was thereafter dismissed.

"distributed" by another employer, the service rendered by a television station is not included therein. [7]

The Board, as respondent on this review, joins issue on this point. The two unions, which were respondents in the agency proceeding and are intervenors here, support the Board's position that the publicity proviso is applicable and protects the union activity in question.

In determining which of these conflicting constructions of the proviso is correct, the critical statutory words, none of which are defined in the Act, are "product," "produced," and "distributed."

In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product."

In this case, however, as all seem to recognize, the context in which the term "product" appears in the proviso precludes the view that the television service rendered by KXTV, considered alone, is a "product" within the meaning of the proviso.[8] On reason for this con- [596] clusion is the fact that in two other places in section 8(b)(4), the term "services" is used in contradistinction to tangible articles. [9]

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[7] In support of the same proposition, the National Association of Broadcasters has filed an amicus curiae brief in this court.

[8] In holding that the "privilege" which a television network sells to a sponsor is not a "commodity" within the meaning of sections 2(a) and 3 of the Clayton Act, 15 U.S.C., sections 13(a), 14 it has been held that the most reliable guide to the meaning of the word is the context in which it is employed. *Columbia Broadcasting System* v. *Amana Refrigeration, Inc.*, 7 Cir., 295 F.2d 375, 378.

[9] In section 8(b)(4)(i), the following words are used: ". . . to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities *or to perform any services;* . . ." (Emphasis supplied.) Near the end of the publicity proviso itself, the following language appears: ". . . to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* . . ." (Emphasis supplied.) In section 8(b)(4)(i)

It is likely that Congress would have followed this same format if it had intended the publicity proviso to apply with regard to a primary employer who renders services instead of manufactures tangible articles.

A second and still more persuasive reason why television advertising service, considered alone, could not be a "product" within the meaning of the publicity proviso lies in the fact that the only "products" there referred to are those which are capable of being "distributed" by "another employer." An advertising service rendered by a television station is not capable of being so "distributed," least of all by an employer whose only relationship with the station is that of an advertiser.

The Board, however, believes that it has overcome this difficulty by holding that it is not the television service of KXTV, standing alone, which is the "product" here, but the item being advertised on that station. KXTV becomes one of the "producers" of the items advertised, the Board reasons, "by adding its labor in the form of capital, enterprise and service . . ." to such items.

It may be noted, however, even before testing the correctness of this line of reasoning, that it leads to the rather remarkable conclusion that a television station can be a producer of automobiles, bread, gasoline and beer. [10]

In reaching its conclusion the Board followed its decision rendered on October 31, 1961, in *Middle South Broadcasting Co.*, 133 NLRB No. 1698. The primary employer in

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[9] [footnote cont'd]

(ii)(B), while the word "services" is not used, the following language indicates the same differentiation between a primary employer who produces, processes or manufactures a tangible article, and one who does not; ". . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, *or to cease doing business with any other person*, . . ." (Emphasis added.)

[10] It also requires one to regard the advertisers of those products, who either manufacture the article themselves or distribute articles manufactured by companies having no connection with the television station, as the "distributors" of articles "produced" by a television station.

that case was a radio broadcasting station. In turn, the decision in *Middle South Broadcasting* was based upon the Board's decision rendered on August 10, 1961 in *International Brotherhood of Teamsters, etc. (Lohman Sales Company)* 132 NLRB 901. There the primary employer was a wholesale distributor of cigarettes, cigars, other tobacco products, candy, and related products. The issue was whether a wholesale distributor is a producer of products within the meaning of the proviso.

In the *Lohman* case the Board first determined that, so far as human effort is concerned, labor is the prime requisite of one who produces.[11] The Board then reasoned that not only the actual manu [597] facturer, but also the wholesaler, adds "labor in the form of capital, enterprise, and service to the product he furnishes the retailers." "In this sense, therefore," the Board stated, "Lohman, as the other employers who 'handled' the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. . . ."

In the Board's contemplation then, the "production" of cigarettes includes every phase of activity, beginning with the combination of tobacco seed, earth and water, and ending with the ready availability of cigarettes to the smoking public. Each employer in the process of production begins with what, to him, are raw materials, and "produces" what

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[11] In reaching this conclusion the Board relied upon dictionary definitions, primarily upon a definition of "product" to be found in A. Meriam Webster, Webster's New Collegiate Dictionary, 1959, and an explanation of the term "production" contained in Black's Law Dictionary, Fourth Edition, West Publishing Co., 1951, pages 374-375. The latter definition is as follows:

> "In political economy. The creation of objects which constitute wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensable. Natural motive powers may be called in to the assistance of labor and are a help, but not an essential, of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore, in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton."

to him is a finished "product." The wholesale distributor (or in our case the television station) "handles" cigarettes which are not yet readily available to the members of the smoking public in the same sense as the manufacturer "handles" raw tobacco which has not yet become cigarettes. In this sense the wholesale distributor and the television station are producers of products capable of being distributed by their successors in the production process.

As we have indicated earlier in this opinion, the terms "product," "produce" and "production" may be construed this broadly if they are not found in a more restrictive context. But, as we have also indicated earlier, the context in which the words "produce" and "product" are found indicates that in using them Congress was referring to one kind of economic activity and its result rather than to all economic activity and its result.

The Board proceeds on the assumption that Congress intended "product" to encompass the results of all forms of economically productive labor. Yet it concedes that a television station's product is not advertising but the subject of the advertising. So long as the subject of the advertising is a tangible article these propositions need not lead to an incongruous result.

But if, instead of a tangible article, the subject of the television advertising is a service, such as banking or cleaning, an internal inconsistency at once appears.[12] It derives from the fact that while television advertising service, as such, is not to be regarded as a "product" under the proviso, because it is not capable of being distributed, a service being advertised on television is to be regarded as a "product," although it is equally incapable of being distributed.

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[12] There is evidence in the case before us that the unions directed informational activity against one bank and one dry cleaning establishment. Since neither the bank nor the cleaners was found to be engaged in commerce or an industry affecting commerce, however, the union's activity with respect to them is not in issue here.

Thus, while the Board adopts a broad construction of the term "product" in order to obviate the incongruity of saying that a television advertising service is capable of being distributed, we find that, after all, the underlying difficulty has not been avoided. The Board is still saying that a service, though one being advertised rather than the television service itself, is a "product," although not capable of being distributed.

Only now the Board has involved itself in the additional difficulty of saying that a television station is a "producer" of banking and cleaning services which are "distributed" by banks and cleaners. If the capacity for distribution require- [598] ment is to be ignored it might as well be at the outset, with reference to television advertising service, thereby avoiding the futile involvements inherent in the Board's broad construction.

The Board expressed the view in *Lohman* that unless its concept were accepted, it must follow that "vast numbers of our working population produce nothing." [13] The weakness of this argument lies in the assumption that if, for the purposes of the proviso, the term "product" must be limited to a tangible article it must follow that even in a broad economic sense, only those engaged in manufacturing tangible articles are "producers."

The two frames of reference should not be confused. For the limited purposes of the proviso only those who deal with tangible articles are "producers," but in general economic theory, all who engage in useful labor, whether or not directly related to tangible articles, are "producers." In order to hold that a television station is not, within the meaning of the proviso, the producer of automobiles which

[13] Developing this idea, the Board said in *Lohman*:

> ". . . Their thought, labor, or business enterprise is not a 'product.' We do not believe that the plain meaning of the words 'product' and 'produced' requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled."

it advertises, it is not necessary to conclude that the engineers, announcers, advertising men and others employed by the station are not "productive." They perform a television advertising service, just as the employees of Lohman perform a distribution service. But since the fruit of their labor is not capable of physical distribution by others, it is not a "product" as that term is used in the proviso.

The Board believes that the legislative history indicates that the result reached in *Lohman, Middle South Broadcasting* and this case, is what Congress really intended.

We very much doubt that the statutory language of the publicity proviso is ambiguous with regard to the meaning of "produced," thereby warranting reference to legislative history. While this term is not defined in the Act, the context indicates to us that, in the proviso, Congress was referring to the activity of a primary employer in applying capital, labor and enterprise to effect the conversion of raw materials in his possession into a more finished tangible article.

In section 8(b)(4)(i)(ii)(B), which contains the only statutory reference to the kind of employers who can be the creators of "products," as that term is used in the Act, the words used are: ". . . the products of any other producer, processor, or manufacturer . . ." [14] The words "processor" and "manufacturer" refer to persons engaged in a physical creative activity, and it is reasonable to believe that the word "producer" was used in the same sense. There is no reason to believe that "produced" was used in the proviso in any different sense than "producer" was used in section 8(b)(4)(i)(ii)(B).

But, assuming that resort to legislative history is appropriate, we believe it to be inconclusive as to the point under discussion.

It is true that this history indicates that some Senators and Congressmen expressed the view that inclusion of the

[14] The pertinent part of section 8(b)(4) is quoted in note 5.

publicity proviso was necessary because without it, section 8(b)(4)(ii)(B) might outlaw forms of publicity such as leaflets, radio broadcasts, and newspaper advertisements, thereby impinging upon free speech.[15] The Board argues, in effect, that there is no reason to believe [599] that Congress was less interested in preserving free speech where the primary employer is a distributor, or a radio or television operator, than when he is a manufacturer of tangible articles.

If all that Congress really had in mind in adding the publicity proviso was to implement, with respect to leaflets, broadcasting and newspapers, the free speech guarantee of the First Amendment, the proviso was not needed and would have to be regarded as surplusage. Section 8(c) of the Act, 29 U.S.C. § 158(c), already in effect, provided complete implementation of the First Amendment in this regard.[16] As intervenors in this case concede, section 8(c) is "no more than a restatement of the principle embodied in the First Amendment," quoting *NLRB* v. *LaSalle Steel Co.*, 7 Cir., 178 F.2d 829, 835.

Section 8(c), however, does not protect, under the guise of free speech, publicity activity which is associated with

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[15] When the proposed 1959 amendment of section 8(b)(4) got to conference without such a proviso, Senator Kennedy and Representative Thompson expressed this concern. (105 Cong. Rec. 16591; II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [Leg. Hist.] 1708). The proviso was thereafter added as a "clarification." (105 Cong. Rec. 18022; II Leg. Hist. 1712). In discussing the addition of this proviso, Senator Kennedy explained that, without the proviso, the amendment of section 8(b)(4) would have prohibited "the handing out of handbills or even taking out an advertisement in a newspaper." (105 Cong. Rec. 17720, 17898-17899; II Leg. Hist. 1388-1389, 1432). Senator Douglas and Representative Udall similarly expressed the view that the proviso was necessary to protect free speech. (105 Cong. Rec. 19904, 18135; II Leg. Hist. 1834, 1722).

[16] Section 8(c) reads:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

coercion, since that subsection ends with the words, ". . . if such expression contains no threat of reprisal or force or promise of benefit." Thus if Congress desired to protect any kind of publicity which was associated with coercion, it was necessary to add statutory language which did not contain the limitations built into section 8(c). Apparently Congress did want to protect some publicity of this kind, and so solved the problem by adding the publicity proviso. [17]

This demonstrates, we think, that the meaning of "produced," as used in the publicity proviso, is not to be given an all-inclusive construction on the theory that Congress was trying to guarantee free speech. On the contrary, it suggests that since the publicity being protected by the proviso could be of a kind associated with threats, coercion, or restraint. Congress did not intend an expansive exception but chose words which would have limited application.

Had Congress intended to except publicity concerning primary employers whose own products were of an intangible nature not capable of "distribution," the [600] proviso

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[17] The Board has itself held in *Lohman, Middle South Broadcasting Co.* and the case now before us, that the publicity proviso excepts certain publicity although coercion may be involved. The statutory authority for this is to be found in section 8(b)(4)(ii), quoted in note 5.

The Board said in *Lohman*, at page 904:

> ". . . While such conduct otherwise might constitute restraint and coercion, we agree with the conclusion of the Trial Examiner that Respondent's hand-billing in this case was protected by the proviso to Section 8(b)(4)."

The Board reached a similar conclusion in its *Middle South Broadcasting Co.* decision, saying, at page 1705:

> ". . . We also agree with his [Trial Examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."

In the case now before us the Board, in its decision, makes reference, with approval, to its holding in *Lohman* that publicity activity may be protected by the publicity proviso, although such activity "might constitute restraint and coercion. . . ."

could have been much simpler than that which was enacted. It would have been sufficient to say that nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, "for the purpose of truthfully advising the public (including consumers) that *an establishment is operated,* or goods are produced or distributed, by an employer engaged in a labor dispute. . . ." (Emphasis supplied.)

In fact these identical words were proposed in a Senate Resolution, instructing the Senate conferees on S. 1555, offered in the Senate on August 28, 1959, by Senators Kennedy, McNamara, Morse and Randolph.[18] This resolution was not adopted.

Unlike the language proposed in the resolution which was not adopted, the statutory proviso does not include among designated primary employers, those who "operated" establishments or "distributed" goods. The only primary employers referred to in the enacted proviso are those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution.

It seems unlikely that an easy way of expanding the coverage of the proviso would have been rejected and detailed limiting provisions (which under the Board's reasoning become surplusage) would have been developed, if it had been intended that the proviso was to have the broad coverage given to it by the agency.[19]

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[18] II Leg. Hist. 1383.

[19] We do not, however, agree with petitioner that significance is to be attached to the fact that, during the Congressional debates, the proviso as it was finally enacted was referred to only as one which would permit publicity concerning "goods" or "products." A close reading of the legislative history leads us to believe that reference to "goods" and "products" produced by non-union or struck "manufacturers" served only as an exemplification of the typical secondary boycott situation rather than as a conscious expression of Congressional purpose.

The foregoing considerations lead us to conclude that the publicity proviso which is a part of section 8(b)(4)(B) does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers.

Intervenors argue, however, that even if the publicity proviso is inapplicable there are two other reasons why the Board order should be sustained. These are: (1) Section 8(b)(4)(ii)(B) relates only to union activity which tends to "threaten, coerce, or restrain," and the activity here in question was not of that kind; and (2) the union activity involved in this case is protected by the free speech and free press provisions of the First Amendment to the Federal Constitution.

The Board relied on neither of these grounds in entering its order here under review. With regard to the "coercion" argument, a determination is complicated by the fact that eight separate and distinct union actions are drawn into question. Some may be coercive and some may not.

In our view, the Board should make a determination as to the merits of these two additional arguments advanced by intervenors before this court is called upon to consider them.

The Board order under review is reversed and the cause is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions raised by intervenors, as noted above.

(Endorsed) Opinion Filed Nov. 9, 1962.

Frank H. Schmid, Clerk.